

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Case No. 2:22-cr-00057-JCM-NJK

Plaintiff(s),

ORDER

V.

DAMIEN PATILLO,

Defendant(s).

Presently before the court is defendant Damien Patillo’s (“Patillo”) motion to dismiss (ECF No. 27). The government filed a response (ECF No. 31), to which Patillo replied (ECF No. 42). For the reasons set forth below, the court denies Patillo’s motion.

I. Background

Patillo is charged with being a felon in possession of a firearm, possession with intent to distribute methamphetamine, and possession of a firearm in furtherance of a drug trafficking offense. (ECF No. 34). The alleged facts of the case are as follows.

On September 12, 2021, Las Vegas Metropolitan Police Department (“LVMPD”) officers observed Patillo jaywalking with a woman. (ECF No. 31, at 2). Patillo, who was wearing a closed bag around his chest, fled through a nearby lot after the officers attempted to approach him. (*Id.*). Following a foot chase, the officers apprehended him and observed that his bag was now fully open. (*Id.*). The officers retraced Patillo’s flight path and found a revolver on the ground that later

1 tested positive for his DNA. (*Id.*). The officers also found individually packaged bags of
 2 methamphetamine on Patillo. (*Id.*).
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4 The superseding indictment alleges that Patillo knew he had been convicted previously of
 5 nine felony offenses. (ECF No. 34, at 2). These felonies include attempted burglary, domestic
 6 violence battery, possession of a stolen vehicle, possession and intent to sell a controlled substance,
 7 and possession of a firearm by a prohibited person. (*Id.*). Patillo now moves to dismiss count one
 8 (the felon-in-possession charge) of the superseding indictment, arguing that 18 U.S.C. Section
 9 922(g)(1) is unconstitutional based on the Supreme Court's recent decision in *New York State Rifle*
 10 & Pistol Association v. Bruen.¹ 597 U.S. 1 (2022). (ECF No. 27).
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12 **II. Legal Standard**

13 Under Federal Rule of Criminal Procedure 12(b), a party "may raise by pretrial motion any
 14 defense, objection, or request that the court can determine without a trial on the merits." FED. R.
 15 CRIM. P. 12(b). A criminal indictment can be dismissed on constitutional grounds by a 12(b)
 16 motion. *See United States v. Lopez*, 514 U.S. 549, 551–52 (1995); *see also United States v. Mayer*,
 17 503 F.3d 740, 747 (9th Cir. 2007).
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19 **III. Discussion**

20 The gravamen of Patillo's argument is that *Bruen* abrogated prior Ninth Circuit precedent
 21 holding Section 922(g)(1) constitutional. (*See* ECF No. 27, at 9–11). Accordingly, Patillo
 22 contends that Section 922(g)(1) should be reevaluated under *Bruen*'s new constitutional
 23 framework and found unconstitutional. (*See id.* at 12–27). The government counters that Section
 24 922(g)(1) is constitutional, even under *Bruen*. (*See generally* ECF No. 31). Having considered
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 28 ¹ Though Patillo requested an evidentiary hearing in his motion, he later withdrew that
 request. (ECF No. 42).

1 the parties' arguments, this court joins the chorus of courts in this circuit that have upheld Section
 2 922(g)(1) and prior Ninth Circuit precedent.² The court therefore resolves Patillo's motion to
 3 dismiss under that prior Circuit precedent.
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5 **A. The Supreme Court's Second Amendment Precedent**

6 Patillo argues that *Bruen* "compels the conclusion that Section 922(g)(1) impermissibly
 7 infringes upon" his Second Amendment right. (ECF No. 27, at 3). Unconvinced by Patillo's
 8 argument, the court begins by providing background on the Supreme Court's recent Second
 9 Amendment jurisprudence, including *Bruen*.
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11 In *District of Columbia v. Heller*, the Supreme Court found "on the basis of both text and
 12 history" that "the Second Amendment conferred an individual right to keep and bear arms,"
 13 particularly in an individual's home and for self-defense. 554 U.S. 595, 570 (2008). The Supreme
 14 Court dedicated the bulk of *Heller* to explaining that the right to bear arms is an individual right
 15 rather than a collective right exercised only by a militia. *See id.* at 576–81. But the Court also
 16 found that "the right was not unlimited." *Id.* at 595. Further, it stated that, "[a]lthough we do not
 17 undertake an exhaustive historical analysis today of the full scope of the Second Amendment,
 18 nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession
 19 of firearms by felons." *Id.* at 626.
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 24 ² E.g., *United States v. Gamble*, No. 2:22-CR-267-JAD-EJY, 2023 WL 6460665, at *3 (D.
 25 Nev. Oct. 4, 2023) (upholding Section 922(g)(1) and finding previous Ninth Circuit caselaw
 26 consistent with *Bruen*); *United States v. Hill*, 629 F. Supp. 3d 1027, 1030 (S.D. Cal. 2022) (finding
 27 that previous Ninth Circuit precedent was not overruled by *Bruen*); *United States v. Adame-Lopez*,
 28 No. 3:23-CR-24-LRH-CLB, 2024 WL 343442, at *4 (D. Nev. Jan. 30, 2024) (denying motion to
 dismiss on same grounds); *United States v. Brown*, No. 2:22-CR-214-JAD-DJA, 2023 WL
 7017622, at *4 (D. Nev. Oct. 25, 2023) (finding Section 922(g)(1) constitutional under prior Ninth
 Circuit precedent and *Bruen*'s new test); *United States v. Roberts*, No. 3:23-CR-57-TMB-KFR1,
 2024 WL 50889, at *6 (D. Alaska Jan. 4, 2024) (explaining that every district court in the Ninth
 Circuit has upheld Section 922(g)(1)'s constitutionality in the face of *Bruen*).

1 *McDonald v. City of Chicago* advanced the Supreme Court’s Second Amendment
 2 jurisprudence by incorporating the Second Amendment right defined in *Heller* against the states.
 3 *McDonald*, 561 U.S. 742, 791 (2010). In *McDonald*, the Supreme Court reaffirmed the limits of
 4 its Second Amendment holdings. *Id.* at 786. The justices reiterated that “[w]e made it clear in
 5 *Heller* that our holding did not cast doubt on such longstanding regulatory measures as prohibitions
 6 on the possession of firearms by felons . . .” *Id.* (internal citations omitted).

8 *Bruen* is the most recent addition to the Supreme Court’s Second Amendment
 9 jurisprudence and the decision upon which Patillo relies for his argument. However, while the
 10 Supreme Court’s holding in *Bruen* expanded the individual right to keep and bear arms for self-
 11 defense from the home to in public, it did not overturn all firearm regulations. 597 U.S. at 70.
 12 *Bruen* held that “the Second Amendment is not unlimited,” 597 U.S. at 21 (internal citations
 13 omitted); *Heller*, 554 U.S. at 595; *McDonald*, 561 U.S. at 786, nor is it a “regulatory
 14 straightjacket.” 597 U.S. at 30. Furthermore, Justice Kavanaugh, joined by Justice Roberts,
 15 reaffirmed the language used in *Heller* and *McDonald* by specifically approving of “longstanding
 16 prohibitions on the possession of firearms by felons” in his concurring opinion. 597 U.S. at 81
 17 (Kavanaugh, J., concurring). Justice Alito also noted in his concurring opinion that “[o]ur decision
 18 . . . does not expand the categories of people who may lawfully possess a gun.” *Id.* at 73 (Alito,
 19 J., concurring).

20 Notwithstanding the Supreme Court’s explicit recognition of the constitutionality of felon-
 21 in-possession regulations on firearms, *id.* at 81 (Kavanaugh, J., concurring), Patillo rests his
 22 argument on *Bruen*’s rejection of the circuit courts’ two-step framework for analyzing Second
 23 Amendment challenges that emerged following *Heller* and *McDonald*. *Id.* at 19–23. Step one
 24 required the government to conduct a historical analysis, while step two was a means-end scrutiny
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1 test that evaluated the “severity of the law’s burden” on the implicated Second Amendment right.
 2 *Id.* Patillo argues this section of *Bruen* abrogates previous Ninth Circuit decisions. (ECF No. 27
 3 at 3).
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5 In declining the circuit courts’ two-step test, the Court in *Bruen* did not set forth an entirely
 6 new framework for evaluating firearms regulations, as contended by Patillo. *Id.* at 31. Rather, the
 7 Court merely found the second step “one step too many,” while affirming the first. *Bruen*, 597
 8 U.S. at 17–20. The court found the first step consistent with *Heller* and made it “more explicit.”
 9 *Id.* at 31. Thus, *Bruen* abrogated only decisions that found firearm regulations constitutional under
 10 the second step, but not those that found constitutionality based on a historical analysis under the
 11 first step. *Id.* at 17–18. *Bruen* also reaffirmed the Court’s limiting holdings in *Heller*. *Id.* at 21.
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13 Accordingly, while Patillo argues that the government must conduct an extensive historical
 14 analysis of Section 922(g)(1) (ECF No. 27, at 13–14), such an approach is unnecessary since
 15 previous Ninth Circuit decisions already performed a historical analysis under *Heller* and therefore
 16 provide this court with binding precedent. *See United States v. Vongxay*, 594 F.3d 1111 (9th Cir.
 17 2010); *United States v. Phillips*, 827 F.3d 1171 (9th Cir. 2016).
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19 **B. *Bruen* has not abrogated Ninth Circuit caselaw.**

20 Patillo argues that *Bruen* abrogated prior Ninth Circuit caselaw finding felon-in-possession
 21 statutes constitutional. (ECF No.27, at 11). Patillo points specifically to *Vongxay* and *Phillips*,
 22 arguing that *Heller*’s list of “presumptively lawful” restrictions, upon which *Vongxay* and *Phillips*
 23 relied, were overturned by *Bruen* due to its emphasis on *Heller*’s historical analysis. (ECF No. 27,
 24 at 9). The government contends that Patillo “fundamentally misconstrues” Supreme Court
 25 precedent, arguing that *Bruen* merely made “more explicit” the historical analysis outlined in
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1 *Heller* and used by the Ninth Circuit in *Vongxay* and *Phillips*. (ECF No. 31, at 4–6). The court
 2 agrees with the government.

3 “Some tension between the intervening higher authority and prior circuit precedent” is not
 4 enough to overrule Ninth Circuit precedent. *Fed. Trade Comm’n v. Consumer Def., LLC*, 926 F.3d
 5 1208, 1213 (9th Cir. 2019) (internal citations and quotations omitted). Further, even if “the
 6 intervening higher authority [has] cast doubt on the prior [Ninth Circuit] precedent . . . [t]he
 7 intervening higher precedent must be *clearly inconsistent*” with prior Ninth Circuit precedent for
 8 it to be overruled. *Lair v. Bullock*, 697 F.3d 1200, 1027 (9th Cir. 2012) (emphasis added) (internal
 9 citations and quotations omitted). The Ninth Circuit has held that, “as long as we can apply our
 10 prior circuit precedent without running afoul of the intervening authority, we must do so.” *Id.*
 11 (internal citations and quotations omitted).

14 Although “some tension” may exist between the Supreme Court’s holding in *Bruen* and
 15 the Ninth Circuit’s precedent in *Vongxay* and *Phillips*, it is not enough to overturn the latter cases.
 16 *Consumer Def., LLC*, 926 F.3d at 1213. The Supreme Court’s holding in *Bruen* leaves the Ninth
 17 Circuit’s holding in *Vongxay* and *Phillips* undisturbed because the Ninth Circuit used the historical
 18 analysis required by *Heller* and *Bruen* to uphold the constitutionality of 18 U.S.C. Section
 19 922(g)(1). *See Vongxay*, 594 F.3d at 1116–18; *see also Phillips*, 827 F.3d at 1174–76, n.2.

21 In *Vongxay*, the Ninth Circuit found that felons are “categorically different” than “the
 22 people” who have historically held a right to bear arms under the Second Amendment. 594 F.3d
 23 at 1115. The circuit court explained that because “the right to bear arms was inextricably . . . tied
 24 to the concept of a virtuous citizenry,” “the right to bear arms does not preclude laws disarming
 25 the unvirtuous citizens (i.e. criminals) . . .” *Vongxay*, 594 F.3d at 1118. Additionally, the Ninth
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1 Circuit found that *Heller* identified the “longstanding restrictions on gun possession” by felons as
 2 “presumptively lawful.” *Id.* (quoting *Heller*, 554 U.S. at 626).

3 In *Phillips*, the Ninth Circuit explicitly referenced its reliance on *Heller* when it said that
 4 “[t]he Court in *Heller* seemed to equate the status of a felon . . . with a presumptive disqualification
 5 from the Second Amendment right.” 827 F.3d at 1174 (internal citations omitted). Thus, Ninth
 6 Circuit precedent necessarily “forecloses” an argument that Section 922(g)(1) is unconstitutional.
 7 *Id.* at 1174.

8 Rather than overturning the limiting language in *Heller* and *McDonald* that allows
 9 “longstanding prohibitions” on firearms for felons, Justice Kavanaugh’s concurrence in *Bruen*
 10 specifically upheld that language. 597 U.S. at 81 (Kavanaugh, J., concurring). The majority also
 11 held that the Second Amendment right “to bear commonly used arms in public” is “subject to
 12 certain reasonable, well-defined restrictions.” *Id.* at 70. Accordingly, in holding that *Heller*’s non-
 13 exhaustive list of “presumptively lawful” firearm regulations was “integral” to the Supreme
 14 Court’s decision and thus binding, Ninth Circuit precedent is in line with the holdings in *Heller*,
 15 *McDonald*, and now *Bruen*. *Vongxay*, 594 F.3d at 1115; *accord Heller*, 554 U.S. at 627, n.26. See
 16 *McDonald*, 561 U.S. at 786 (stating that the Court’s holding “does not imperil every law regulating
 17 firearms”); *Bruen*, 597 U.S. at 81 (identifying “prohibitions on possession of firearms by felons”
 18 as “presumptively lawful”).

20 Because the court finds that *Bruen* did not abrogate *Vongxay* and *Phillips*, the court
 21 declines to reexamine the constitutionality of Section 922(g)(1). Under *Vongxay* and *Phillips*,
 22 Section 922(g)(1) is constitutional because Ninth Circuit precedent must be “clearly inconsistent”
 23 with Supreme Court precedent for it to be overturned. Because they are not clearly inconsistent,
 24 the holdings in *Vongxay* and *Phillips* are still good law.

IV. Conclusion

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendant's motion to dismiss (ECF No. 27) is DENIED.

DATED February 21, 2024.

Xelius C. Mahan
UNITED STATES DISTRICT JUDGE